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In the Supreme Court of the United States

October Term, 1979

No. 79-1305

LUTHERAN MUTUAL LIFE INSURANCE COMPANY,
Petitioner.

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRUCE B. GRAVES
1200 Register & Tribune Building
Des Moines, Iowa 50309
Counsel for Petitioner

Of Counsel:
ARTHUR J. HESSBURG
WILLIAM C. BROWN

February 25, 1980

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Statutory Provisions Involved 3
Statement of the Case 3
Reasons for Granting the Writ 8

1. The Decision Below Is in Conflict With a Decision of the United States Tax Court Now on Appeal to the Court of Appeals for the Seventh Circuit 8
2. The Decision Below Raises Significant and Important Problems Regarding Administrative Actions and Representations and Congressional Action in Reliance Thereon 10
3. The Decision Below Raises Significant and Recurring Problems Concerning the Proper Opening Reserve Figures in the First Taxable Year to Which a Taxing Statute Applies to an Insurance Company Taxpayer 13

Conclusion 15

Appendix—

A. Opinion of the United States Court of Claims A1
B. Order of the United States Court of Claims A9
C. Statutory Provisions Involved A10

Citations

CASES

Home Mutual Insurance Company v. Commissioner, 70 T.C. 944 (1978), appeal docketed Nos. 79-1602 and 79-1603, 7th Cir., March 8, 1979 ..... 8, 9, 10, 14

Pacific Mutual Life Insurance Company v. Commissioner, 48 T.C. 118 (1969) 8

STATUTES

I.R.C. Section 802 (1959) 3
I.R.C. Section 805(c)(1) 14
I.R.C. Section 809 (1959) 3, 14
I.R.C. Section 810 (1959) 14
I.R.C. Section 811 (1959) 3, 5, 6, 7, 8, 9, 10, 13
I.R.C. Section 818 (1959) 3
I.R.C. Section 832(b)(5) 8, 14
28 U.S.C. §1491 4
28 U.S.C. §1255(1) 2

SECONDARY MATERIAL

S. REPT. No. 291, 86 Cong., 1st Sess. (1959), 1959-2 C.B. 813 6
105 CONG. REC. 8430 (1959) (remarks of Senator Curtis) 10
105 CONG. REC. 8435 (1959) (remarks of Senator Byrd) 7
105 CONG. REC. 8435 (1959) (letter of David A. Lindsay, Assistant Secretary of the Treasury, to Senator Byrd, Chairman of the Senate Finance Committee) 7
Hearings on H.R. 4245 Before the Senate Comm. on Finance, 86th Cong., 1st Sess. at 565 (1959) 6

In the Supreme Court of the United States

October Term, 1979

No. .....

LUTHERAN MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner Lutheran Mutual Life Insurance Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on July 18, 1979.

OPINIONS BELOW

The opinion of the United States Court of Claims appears in Appendix A hereto and is reported at 602 F.2d 328 (1979). The opinion is not yet reported in the Court of Claims reports.

JURISDICTION

The judgment of the United States Court of Claims was entered on July 18, 1979. A timely petition for rehearing was denied by the United States Court of Claims by order dated September 28, 1979, a copy of which order is set forth in Appendix B, and within 90 days of that date petitioner filed with this court a timely request for extension of time within which to petition for certiorari. By order dated December 21, 1979, the Honorable Chief Justice Warren E. Burger granted petitioner an extension of time within which to petition for certiorari to and including February 25, 1980, and this petition for certiorari was timely filed within the extended period for filing. This Court's jurisdiction is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

1. Whether in the first taxable year under a new federal taxing statute an insurance company may use the actual amount paid during the taxable year as its opening reserve figure when computing a deduction based in part upon such opening reserve.

2. Whether the Treasury Department abused its discretion in denying petitioner the right to use the actual amount paid during the taxable year as its opening reserve for purposes of computing its deduction for dividends to policyholders for the first taxable year in which the deduction computation was required to be made.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

Section 802

Section 809

Section 811

Section 818

Since such statutory provisions are lengthy, their pertinent text is set forth in Appendix C hereto.

STATEMENT OF THE CASE

Petitioner is a mutual life insurance company with principal offices at Waverly, Iowa. It maintains its books and records and files its federal income tax returns on a calendar years basis. As a mutual life insurance company, petitioner is entitled to a deduction for dividends to policyholders in computing its taxable income. Such deduction is computed under Section 811[1] by adding or subtracting, as the case may be, the excess or deficit of the reserve for dividends to policyholders at year-end over such reserve at the end of the previous year to or from the amount of dividends actually paid to policyholders during the year. In its 1958 income tax return, the first year to which the Life Insurance Company Tax Act of 1959 applied, petitioner claimed a deduction for dividends to policyholders under Section 811 in the amount of $2,151,000.00, computed as follows:

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1. All references herein are to the Internal Revenue Code of 1954, as amended.

Dividends paid during year		$1,928,455.08
Increased by excess of		
– Reserve for dividends on December 31, 1958	$2,206,000.00	
over		
– Reserve for dividends on December 31, 1957	$1,983,455.08	222,544.92
Dividends paid deduction, per return		$2,151,000.00

Upon audit, the revenue agent determined that petitioner was entitled to a dividends-paid deduction in its 1958 return of only $2,079,455.08, computed by increasing the reserve for dividends on December 31, 1957, to $2,055,000.00. As a result, on December 15, 1967, additional 1958 income tax of $51,931.12 and deficiency interest of $27,132.23 were assessed against and collected from petitioner.

On December 3, 1969, petitioner filed a timely Claim for Refund seeking refund of that portion of the additional 1958 income taxes and deficiency interest assessed and paid which was attributable to the revenue agent's recalculation of petitioner's deduction for dividends to policyholders. Such Claim for Refund was denied in full by the Internal Revenue Service on August 14, 1973. Thereafter, petitioner timely brought suit in the United States Court of Claims seeking refund of 1958 income taxes and deficiency interest. The jurisdiction of the Court of Claims was invoked under 28 U.S.C. §1491.

Upon respondent's Motion for Partial Summary Judgment and petitioner's Cross-Motion for Partial Summary Judgment on the issue of the proper opening reserve figure, the United States Court of Claims granted respondent's motion and denied petitioner's motion by opinion dated July 18, 1979. The Court held that there was no

"*Congressional* intent to allow special treatment of the opening dividend reserve, especially in the face of an unambiguous statute which makes no reference to such treatment. . ." and that petitioner's "treatment of its opening dividend reserve was contrary to the language of I.R.C. §811(b)." The Court further held that "any assertion that the Congress relied on the alleged promise by the Treasury Department would be untenable."

During Congressional consideration of the Life Insurance Company Tax Act of 1959, the manner of calculating the December 31, 1957, reserve for dividends to policyholders for purposes of determining the 1958 deduction for dividends to policyholders under the Act was considered by the Senate. During the Senate Finance Committee's hearings and debate on the Act, there was added to the section which later became known as Section 811 a subsection (b)(3) which would have required the December 31, 1957, reserve figure to be an amount equal to the actual dividends paid during 1958.[2] During the Senate

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2. Such subsection (b)(3) provided as follows:

> (3) 1958 Reserve for Dividends to Policyholders. - For purposes of paragraph (1), the amounts held at the end of 1957 for dividends to policyholders payable in 1958 shall be the amounts actually paid as such dividends during 1958.

The Report of the Senate Finance Committee contained the following explanation of the provision:

> Paragraph 3 of Section 811(b), for which there is no corresponding provision in the House bill, provides that for purposes of Section 811(b)(1) the amount held at the end of 1957 as reserves for dividends to policyholders payable during 1958 shall be the amounts actually paid as dividends to policyholders during 1958. For example, assume that the X Company and the Y Company each held as of December 31, 1957, and as shown on their books, a total amount of $10,000.00 as reserves for dividends to policyholders which were to be paid during 1958. Assume further that the actual amounts paid were $8,000.00 by the X Company and $13,000.00 by the Y Company. For purposes to Section 811(b)(1), the reserves for dividends to policyholders as of December 31,

(Continued on following page)

Finance Committee's hearings and debate on the Act, the Chairman of the Senate Finance Committee requested that the United States Department of the Treasury furnish its formal written opinion as to the desirability of such subsection (b)(3). After Senate Finance Committee consideration of the Act, the bill was reported out to the Senate floor with the recommendation that said subsection (b)(3) be added thereto by amendment.

During Senate debate on the bill, in response to said request by the Chairman of the Senate Finance Committee, the United States Department of the Treasury issued its formal written opinion regarding such subsection (b)(3). The response of the Department, addressed to the Chairman of the Senate Finance Committee, stated that the proposed subsection (b)(3) to Section 811 would work "unintended hardship" on some companies and suggested that the proposed subsection (b)(3) be eliminated, "thus leaving the adjustment for the error in the starting policy dividend reserve to administrative action."[3] On the same

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Footnote continued—

1957, shall be $8,000.00 for the X Company and $13,000.00 for the Y Company (the amounts actually paid as dividends in 1958). S. REPT. No. 291, 86 Cong., 1st Sess. (1959), 1959-2 C.B. 813.

The provision was added pursuant to a memorandum introduced by Senator Carlson during the Senate Finance Committee's hearings. See *Hearings on H.R. 4245 Before the Senate Comm. on Finance*, 86th Cong., 1st Sess. at 565 (1959).

3. The opinion of the Department of the Treasury was in letter form, dated May 19, 1959, signed by Assistant Secretary David A. Lindsay, who was duly authorized to speak and act for the Treasury Department. Such opinion provided as follows:

> This is in reference to your request for our opinion on a proposed amendment to H.R. 4245, the pending life insurance company income tax bill, dealing with the special rule under section 811 (a)(3) [sic], which provides a special rule for the 1958 reserve for dividends to policyholders.
>
> This special rule was originally included in H.R. 4245 for the relief of certain companies which had overstated their

(Continued on following page)

date that the Department's opinion was issued, the Chairman of the Senate Finance Committee proposed to the Senate that subsection (b)(3) be deleted, stating that said provision "was designed to prevent the denial of a deduction for policyholders dividends actually paid in 1958," and that "it now appears that this is unnecessary and that the same result can be obtained administratively by recognizing the error in the reserve balance at the end of 1957."[4] Pursuant to the recommendation of the

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Footnote continued—

> reserve for policyholder dividends at the end of 1957, due to technical errors, caused, in certain cases, for example, by the introduction of new data-processing equipment.
>
> It is further understood that the introduction of this special relief rule will work unintended hardship on certain other companies. Accordingly, it has been suggested that an amendment be adopted to take care of this situation by eliminating section 811 (a)(3) [sic] thus leaving the adjustment for the error in the starting policy dividend reserve to administrative action.
>
> The Department would have no objection to such an amendment. 105 CONG. REC. 8435 (1959) (letter of David A. Lindsay, Assistant Secretary of the Treasury, to Senator Byrd, Chairman of the Senate Finance Committee)

4. The full text of Senator Byrd's comments are as follows:

> Mr. President, this is a technical amendment requested by the Treasury. The amendment strikes out a provision added by the committee to deal with a minor technical problem. The provision in the bill was designed to prevent the denial of a deduction for policyholder dividends actually paid in 1958.
>
> However, it now appears that this is unnecessary and that the same result can be obtained administratively by recognizing the error in the reserve balance at the end of 1957. The Treasury Department has stated that the problem can be handled by administrative action, because it is now understood that the provision unintentionally might injure others and deny them deductions for policyholder dividends which they actually paid. Therefore, the amendment removes paragraph (3) of Section 811 (b).
>
> Mr. President, I ask unanimous consent to have printed at this point in the RECORD a letter which I have received from David A. Lindsay, Assistant to the Secretary of Treasury, in support of the amendment.
>
> [There follows the opinion from the United States Department of the Treasury set forth in note 3, supra] 105 CONG. REC. 8435 (1959) (remarks of Senator Byrd)

Chairman of the Senate Finance Committee, the Senate thereafter deleted the proposed subsection (b)(3) from the bill and from Section 811.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is in Conflict With a Decision of the United States Tax Court Now on Appeal to the Court of Appeals for the Seventh Circuit.

The question of the proper opening reserve figure in the first year to which an insurance company taxing statute applies has arisen several times in litigation. See *Home Mutual Insurance Company v. Commissioner*, 70 T.C. 944 (1978), appeal docketed Nos. 79-1602 and 79-1603, 7th Cir., March 8, 1979; *Pacific Mutual Life Insurance Company v. Commissioner*, 48 T.C. 118 (1969). In its most recent analysis of the issue, *Home Mutual Insurance Company v. Commissioner, supra*, the Tax Court held that a casualty insurance company was entitled to use the actual amount paid during 1963 as its reserve for unpaid losses as of December 31, 1962, in computing its deduction for losses incurred for 1963, the first taxable year to which the reserve calculation of I.R.C. §832(b)(5) applied with respect to mutual casualty insurance companies, and for subsequent years.[5]

After analogizing to and approving of cases allowing adjustments to opening inventory figures where the figures on the tax return were overstated, the Tax Court continued:

5. The December 31, 1962, reserve for unpaid losses affected the losses incurred deduction for years after the first year to which the taxing statute applied, 1963, since some pre-1963 claims were not settled until after 1963. In the instant case, however, all dividends with respect to the policies to which the December 31, 1957, reserve for dividends related were paid in full during 1958.

> The need to permit petitioner to adjust for the overestimation of unpaid losses as of December 31, 1962, is even more compelling in view of its being the first time that the unpaid loss account had any bearing on petitioner's tax liability. 70 T.C. at 951.

Petitioner asserts that the approach taken by the Tax Court in *Home Mutual* is the correct one, but the *Home Mutual* decision was not considered by the court below. Unless a taxpayer can use the actual amount paid as its opening reserve figure in the first year to which the reserve calculation applies, an overestimate or underestimate in such opening reserve figure will result in an erroneous computation of taxable income. While overestimates or underestimates in subsequent years are corrected in following years since a closing reserve figure is also the next year's opening reserve figure, such is not the case with the initial year in which the reserve calculation is used. The remarks of Senator Carl Curtis during the debate of the Life Insurance Company Tax Act of 1959 on the Senate floor make clear that such an initial year misstatement of income was not intended by Congress.[6]

6. The remarks of Senator Carl Curtis during debate on the bill indicate that the proposed subsection (b)(3) to Section 811 was intended to solve the broad problem presented where the December 31, 1957, reserve was overstated, thus resulting in an error which would never be corrected:

> In addition to the foregoing, I should like to invite attention to a relatively minor matter of somewhat technical nature on which I fear the language and intent of the bill might be misconstrued if some appropriate explanation were not made. The point is this: Most appropriately, Section 811(b)(3) of the bill, which was added by the committee, makes it perfectly clear that where through inadvertent error, a life insurance company's reserve for policyholders dividends at the beginning of 1958 were overstated, the error is to be corrected in computing the company's taxable income for 1958 by referring to the dividends actually paid by the company during 1958.
>
> The point I wish to make clear is that there are a good many other types of beginning 1958 reserves which enter into computation of the taxpayer's 1958 taxable income. Any

(Continued on following page)

Since *Home Mutual* is currently pending before the Court of Appeals for the Seventh Circuit, petitioner would have no objection to the Court holding petitioner's petition for writ of certiorari in abeyance until the decision of the Seventh Circuit is rendered.

2. The Decision Below Raises Significant and Important Problems Regarding Administrative Actions and Representations and Congressional Action in Reliance Thereon.

In the course of Congressional debate on the Life Insurance Company Tax Act of 1959, the Senate Finance Committee requested an opinion from the Treasury Department on the proposed subsection (b)(3) to what became known as Section 811 of the Internal Revenue Code, which subsection would have required the use of the actual dividends paid to policyholders during 1958 as the opening 1958 reserve figure. The substance of the Treasury Department's response thereto and the Senate Finance Committee's interpretation of such response was that the section was unnecessary since the Treasury Department would make the initial year adjustments to the opening reserve administratively. Now the govern-

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Footnote continued—

error in any of those opening reserves will result in an erroneous computation of taxable income, if not corrected. Such errors should be corrected in making the tax computations, whether the errors were protaxpayer or progovernment. If such errors are not corrected, the result is an inaccurate and erroneous computation of tax, which, because of the nature of the tax computation, will never be corrected. I think it quite clear that, even without any special provision in the bill itself, a taxpayer or the Internal Revenue Service, as the case may be, has ample authority under other law to correct any error in any opening reserves, in computing taxable income under this bill. Since I understand that to be the law, I am not offering any amendment to the bill on this point, but thought it well to make the record on it completely clear. 105 CONG. REC. 8430 (1959) (remarks of Senator Curtis)

ment claims that the Treasury Department's response to the inquiry of the Senate Finance Committee represented that the Treasury Department would make administrative adjustment only of data processing errors, despite the government's inability to explain why a data processing error should be adjusted administratively while an error due to petitioner's conservative estimating procedures should not. Nowhere in the legislative history is there any indication of Congressional intent to so limit the adjustment to the opening year reserve.

In considering the problems latent in enacting an entirely new scheme of taxation of life insurance companies, Congress was not concerned with niceties of the type urged by the government. An error due to data processing systems could, upon discovery of the error, be cured by an amended return under existing law. Rather, if the Senate Finance Committee's action is to mean anything at all, it was an attempt to deal with the problems of all life insurance company taxpayers inherent in converting from a taxation scheme which did not employ the concept of reserves to one which did.

The attempt of the Treasury Department in this case to retrospectively change its position presents a dangerous threat to the delicate system of checks and balances between the executive and legislative branches of government. In requesting the opinion of the Treasury Department, the Senate intended to discover whether the proposed amendment was necessary and was told by the Treasury Department that it was not. The government's position now indicates that, in retrospect, the amendment probably was necessary to prevent Treasury Department evasion of Congressional intent. The administrative action in this case amounts to legislation by an administrative agency in contravention of Congressional legislation. To

allow the Treasury Department to not make certain administrative adjustments after telling Congress that it would make such adjustments would place a judicial stamp of approval on arbitrary and capricious action of an administrative agency and would sanction divergence of administrative action from Congressional intent.

The decision of the United States Court of Claims further heightens such dangers. In its opinion, the Court of Claims holds that petitioner's case fails because petitioner failed to establish representation to and reliance by both houses of Congress. In connection with pending legislation an administrative agency rarely advises both houses of Congress on the same issue. Yet the opinion of the Court of Claims would enable any administrative agency to make any representation it wants to one house of Congress without having to live up to the terms of the representation made. Such an approach, if allowed to stand, would effectively eliminate the usefulness to Congress of such formal administrative agency opinions except in the limited instances where the opinion is rendered to both houses directly or to a conference committee. The United States Senate is an indispensable part of the whole Congress, and it should be no defense to the Treasury Department that it made its representation to only one arm of the legislative body.

The question presented in this case is whether, in light of the Treasury Department's representations to the Senate Finance Committee, the Treasury Department's refusal to allow petitioner to use the actual dividends paid to policyholders during 1958 as its opening reserve is an abuse of discretion of a character which this Court should prevent. A fair reading of the legislative history would lead a reasonable reader to conclude that the Treasury Department said it would permit administra-

tively what the proposed subsection (b)(3) to Section 811 would have required by statute. The Treasury Department's actions now with respect to petitioner amount to a fraud upon the Senate Finance Committee which it should not be permitted to maintain.

3. The Decision Below Raises Significant and Recurring Problems Concerning the Proper Opening Reserve Figures in the First Taxable Year to Which a Taxing Statute Applies to an Insurance Company Taxpayer.

The sole dispute in this case relates to the proper figure for petitioner's opening reserve for dividends to policyholders for 1958. This dispute arises because 1958 was the first year to which the Life Insurance Company Tax Act of 1959 applied and the first year in which the concept of reserves for dividends to policyholders was relevant to the computation of the taxable income of a mutual life insurance company.

In the enactment of the Life Insurance Company Tax Act of 1959, Congress recognized the difficulties inherent in measuring the income of a life insurance company on an annual basis. Due to the nature of the life insurance business, it is difficult to ascertain the point at which underwriting income (gross premiums not needed to satisfy policy obligations or expenses) or certain deductions are properly accruable. It was for this reason that Congress saw fit to base the system of taxation in part upon averages of and differences between beginning of the year and year-end figures.

In addition to using the difference between beginning of the year and year-end reserves in determining the amount of the deduction for dividends to policyholders, the beginning of the year and year-end figures become relevant to the tax computation in other contexts. For

instance, under Section 805(c)(1) the mean of all life insurance reserves at the beginning and end of a taxable year is used in computing the portion of a life insurance company's income subject to tax. Moreover, under Sections 809(c)(2), 809(d)(2) and 810, the increases or decreases in certain reserves from the beginning of the year to the end of the year enter into the computation of a life insurance company's taxable income.

The difference between beginning of the year and year-end reserves also enters into the computation of the taxable income of insurance companies other than life insurance companies. For instance, the difference between beginning of the year and end of the year estimates for losses incurred affects the amount of a casualty company's deduction for losses incurred under Section 832(b)(5).

The extensive use by Congress of the beginning of the year and year-end reserve figures in computing the taxable income of insurance companies suggests that the concept will continue to be employed in future revenue acts affecting insurance companies. As a consequence, the issue of the proper opening reserve figure in the first year to which such a taxing statute applies will most likely arise again under successive revenue acts and is an issue of industry wide concern. Indeed, the fact that the tax year 1958 is not the only year affected by this issue is demonstrated by the controversy over the proper December 31, 1962, reserve for losses incurred figure under the Revenue Act of 1962 currently pending before the Seventh Circuit. See *Home Mutual Insurance Company v. Commissioner*, 70 T.C. 944 (1978), appeal docketed Nos. 79-1602 and 79-1603, 7th Cir., March 8, 1979.

Without guidance from this Court, the question of the proper opening reserve figure in the first year to which a taxing statute applies will continue to be the

subject of recurring litigation under future revenue acts and will remain shrouded in confusion and uncertainty. To avoid existing and future conflicts of principle on this question, a writ of certiorari should issue to provide guidance to lower courts and the insurance industry.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,

BRUCE B. GRAVES
1200 Register & Tribune Building
Des Moines, Iowa 50309
Counsel for Petitioner

February 25, 1980

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS
No. 172-74
(Decided July 18, 1979)

LUTHERAN MUTUAL LIFE INSURANCE COMPANY

v.

THE UNITED STATES

Bruce B. Graves, attorney of record, for plaintiff, *Swift, Brown, Winick and Graves*, of counsel.

Herbert Grossman, with whom was *Assistant Attorney General M. Carr Ferguson*, for defendant. *Theodore D. Peyser*, of counsel.

Before FRIEDMAN, *Chief Judge*, DAVIS and KASHIWA, *Judges*.

ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

KASHIWA, *Judge*, delivered the opinion of the court:

This action to recover federal income taxes paid by plaintiff for its taxable year 1958 comes before the court on cross motions for partial summary judgment. The issue presented involves the proper method of calculating a life insurance company's deduction for dividends to shareholders under I.R.C. § 811(b). Having considered the briefs

and arguments offered by the parties, we hold for the Government.

Plaintiff is a mutual life insurance company incorporated and with its principal place of business in Iowa. The tax year at issue was the first year life insurance companies were taxed under the Life Insurance Company Income Tax Act of 1959, P. L. 86-69, 73 Stat. 112 (codified in scattered sections of 800, 26 U.S.C.).[1] I.R.C. § 811(b)[2] established the method to determine the amount a life insurance company could claim as a deduction for dividends to policyholders for any taxable year. In simplified form that section instructs the taxpayer to calculate its deduction by: (1) determining the amount of dividends to policyholders actually paid during the taxable year and (2) adding (or subtracting) the difference between the reserve for dividends to policyholders payable in the year following the taxable year and the reserve for dividends

1. The Act, passed in June 1959, applied retroactively to the taxable year 1958.

2. I.R.C. § 811(b) reads in pertinent part:

(b) *Amount of Deduction.*—

(1) *In general.*—Except as limited by section 809(f), the deduction for dividends to policyholders for any taxable year shall be an amount equal to the dividends to policyholders paid during the taxable year—

(A) increased by the excess of (i) the amounts held at the end of the taxable year as reserves for dividends to policyholders (as defined in subsection (a)) payable during the year following the taxable year, over (ii) such amounts held at the end of the preceding taxable year, or

(B) decreased by the excess of (i) such amounts held at the end of the preceding taxable year, over (ii) such amounts held at the end of the taxable year.

For purposes of subparagraphs (A) and (B), there shall be included as amounts held at the end of any taxable year amounts set aside, before the 16th day of the third month of the year following such taxable year * * * for payment during the year following such taxable year.

to policyholders payable in the taxable year. Because of the nature of the second element of the dividend deduction computation,[3] the amount of the reserve for dividends to policyholders payable in 1958 (opening dividend reserve) was particularly important to plaintiff.[4]

As required by Iowa law, plaintiff filed its annual statement for the years 1957 and 1958 on the form prescribed by the National Association of Insurance Commissioners (NAIC). Page three of the annual statement is entitled "Liabilities, Surplus and Other Funds" and contains information on policyholder dividends. In its annual statement for 1957 plaintiff reported $55,000 as dividends due and unpaid from 1957 and $2,000,000 as the estimated amount of dividends payable in the following year.

In preparing its 1958 income tax return, however, plaintiff's calculation of its opening dividend reserve did not fully reflect the amounts stated in its 1957 NAIC annual statement. Plaintiff determined its opening dividend reserve to be $1,983,455. This calculation reflected

3. The second element of the computation reflects the difference between the dividend reserve for the year following the taxable year and the dividend reserve for the taxable year. Since these reserve figures are only estimates based on anticipated dividends payable in the particular year, they usually either slightly understate or overstate the actual amount of dividends paid in that particular year. The slight overstatement or understatement of the reserve will, of course, cause a larger or smaller deduction for dividends paid in a particular year. If the taxation scheme remains constant, however, the second element of the § 811(b) computation will produce a wash effect between taxable years; thus, eliminating any protaxpayer or progovernment benefit.

4. Prior to the enactment of the Life Insurance Company Tax Act of 1959, plaintiff had historically overstated its reserve for dividends to policyholders for reasons relating to state insurance law. If the amount of the opening dividend reserve is overstated, however, the dividend deduction for 1958 will be understated by the same amount. Since the opening dividend reserve figure is not used in the calculation of the dividend deduction for any other year, due to the change in the life insurance taxation scheme which occurred in 1958, this original error is never corrected.

the addition of: (i) $55,000, the amount reported in its 1957 annual statement as unpaid dividends for 1957, to (ii) $1,928,455, the amount of dividends *actually paid in 1958.*[5]

On audit the revenue agent determined plaintiff's proper opening dividend reserve to be $2,055,000. His calculation reflected the addition of: (i) $55,000, the amount reported in plaintiff's 1957 annual statement as unpaid dividends for 1957, to (ii) $2,000,000, the estimated amount of dividends reported in plaintiff's 1957 annual statement for payment in 1958. The Service assessed a deficiency based, in part, upon that adjustment.

The specific issue in this case is whether for purposes of I.R.C. § 811(b) the amount of the opening dividend reserve should have been calculated by reference to the amount of the reserves reported by plaintiff in its 1957 annual statement or by reference to the amount of dividends plaintiff actually paid to policyholders in 1958.

The Life Insurance Company Income Tax Act of 1959 originated in the House of Representatives as bill H.R. 4245. The bill as reported out by the House Ways and Means Committee and as passed by the House of Representatives did not contain any provision for special treatment of the opening dividend reserve.

H.R. 4245 was sent to the Senate and referred to the Senate Finance Committee. During the Committee hearings and debate on the bill, an amendment was offered which provided as follows:

> (3) *1958 Reserve for Dividends to Policyholders.*—For purposes of paragraph (1), the amounts held

5. Plaintiff now argues that the proper calculation of its opening dividend reserve results in the figure $1,929,455.08. Because we hold for the defendant, we need not discuss plaintiff's arguments in support of this calculation.

> at the end of 1957 as reserves for dividends to policyholders payable in 1958 shall be the amounts actually paid as such dividends during 1958.

This amendment was passed by the Committee and the bill was reported out to the Senate.

During the Senate debate on the amended H.R. 4245, the Treasury Department issued a written comment on the amendment set forth above in response to a request from Senator Byrd, Chairman of the Senate Finance Committee. The letter was signed by David A. Lindsay, Assistant to the Secretary of the Treasury. The content of the letter as placed in the record by Senator Byrd is set forth in the margain.[6] While the proper interpretation of the letter is in dispute between the parties, it clearly sets out Treasury's position that the amendment be eliminated. The Senate subsequently voted to delete the amendment, and the legislation as passed by the Senate and signed by the President contained no provision for special treatment of the opening dividend reserve.

6. "This is in reference to your request for our opinion on a proposed amendment to H.R. 4245, the pending life insurance company income-tax bill, dealing with the special rule under section 811(a)(3) [sic], which provides a special rule for the 1958 reserve for dividends to policyholders.

"This special rule was originally included in H.R. 4245 for the relief of certain companies which had overstated their reserve for policyholder dividends at the end of 1957, due to techincal errors, caused, in certain cases, for example, by the introduction of new data-processing equipment.

"It is further understood that the introduction of this special relief rule will work unintended hardship on certain other companies. Accordingly, it has been suggested that an amendment be adopted to take care of this situation by eliminating section 811(a)(3) [sic] thus leaving the adjustment for the error in the starting policy dividend reserve to administrative action.

"The Department would have no objection to such an amendment." [105 Cong. Rec. 8435 (1959).] [The reference was meant to be to section 811(b)(3).]

In arguing for the adoption of its position, plaintiff is faced with a formidable obstacle. There is nothing in the statutory language that supports its position. The statute is complete and unambiguous. A normal understanding of the language of the statute reveals no Congressional intent to give special treatment to the opening dividend reserve calculation. "This normal understanding of the bare language is not conclusive but it is entitled to prevail unless overcome by a persuasive showing from the purpose or history of the legislation." *Aparacor, Inc. v. United States,* 215 Ct. Cl. 596, 600, 571 F. 2d 552, 554 (1978); *Prairie Band of the Pottawatomie Tribe of Indians v. United States,* 215 Ct. Cl. 1, 564 F.2d 38 (1977).

Plaintiff contends that the legislative history shows that the Senate deleted the amendment to H.R. 4245 believing and intending that the adjustments to the opening dividend reserve mandated by that amendment would be permitted administratively by the Treasury. Thus, plaintiff argues that when read in light of the legislative history, § 811 requires the Service to allow it to calculate its opening dividend reserve by reference to the amount of dividends paid to policyholders during 1958. In the alternative, plaintiff requests that we apply the doctrine of equitable estoppel to prevent the Government from asserting a position contrary to that contained in the Treasury's letter to the Senate. The Government answers these contentions by arguing that Treasury's letter only proposed to correct those errors in opening dividend reserve calculations which were "technical" in nature. It asserts that the Service's rejection of plaintiff's treatment of its opening dividend reserve on its 1958 income tax return was consistent with Treasury's statements to the Senate because plaintiff's overstatement of its dividend reserve in its 1957 annual statement was not due to such a "technical" error.

We believe that there is a more straightforward answer to plaintiff's contentions which does not require an interpretation of a letter which is subject to conflicting interpretations. Both of plaintiff's legal theories are based on legislative history which is limited solely to the Senate. While plaintiff speaks repeatedly of the intent of Congress, it has at most offered evidence of the intent of the Senate. When the House of Representatives passed H.R. 4245 and sent it to the Senate, the bill had no provision for special treatment of the opening dividend reserve. The legislation signed by the President had no provision for special treatment of the opening dividend reserve. Plaintiff has offered no evidence to show that the House of Representatives was even aware of the amendment passed by the Senate Finance Committee, or the communication from the Treasury to the Senate. Under these circumstances we cannot find a *Congressional* intent to allow special treatment of the opening dividend reserve, especially in the face of an unambiguous statute which makes no mention of such treatment. *Hart v. United States,* 218 Ct. Cl. ....., 585 F.2d 1025 (1978).

Plaintiff's estoppel argument is similarly flawed. Even if we assume the Treasury's letter should be interpreted as a promise to administratively adjust all errors in an opening dividend reserve,[7] plaintiff has failed to show any promise which was communicated to or relied upon by the House of Representatives. Under the circumstances of this case, any assertion that the Congress relied on the alleged promise by the Treasury Department would be untenable.

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7. By considering plaintiff's argument, we do not intend to endorse the theory that the doctrine of equitable estoppel may properly be invoked in a legislative context. We need not, and do not, decide that question in this case.

We conclude that plaintiff's treatment of its opening dividend reserve in its 1958 income tax return was contrary to the language of I.R.C. § 811(b). Plaintiff has failed to show that Congress meant what it did not say.

Accordingly, defendant's motion for partial summary judgment is granted and plaintiff's cross motion for partial summary judgment is denied. The case is remanded to the Trial Division for appropriate action.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 172-74

LUTHERAN MUTUAL LIFE INSURANCE COMPANY

v.

THE UNITED STATES

Before FRIEDMAN, *Chief Judge,* DAVIS and KASHIWA, *Judges.*

ORDER

(September 28, 1979)

This case comes before the court on plaintiff's motion, filed August 6, 1979, for rehearing pursuant to Rule 151, with reference to the decision entered herein on July 18, 1979. Upon consideration thereof, together with the response in opposition thereto, without oral argument,

IT IS ORDERED that plaintiff's said motion for rehearing is denied.

By the Court

/s/ Daniel M. Friedman
Daniel M. Friedman
Chief Judge

APPENDIX C

Sec. 802. Tax Imposed.

(a) TAX IMPOSED.—

(1) IN GENERAL.—A tax is hereby imposed for each taxable year begining after December 31, 1957, on the life insurance company taxable income of every life insurance company. Such tax shall consist of—

(A) a normal tax on such income computed at the rate provided by section 11(b), and

(B) a surtax, on so much of such income as exceeds $25,000, computed at the rate provided by section 11(c).

(2) TAX IN CASE OF CAPITAL GAINS.—If for any taxable year beginning after December 31, 1958, the net long-term capital gain of any life insurance company exceeds the net short-term capital loss, there is hereby imposed a tax equal to 25 percent of such excess.

(3) SPECIAL RULE FOR 1959 AND 1960.—If any amount is subtracted from the policyholders surplus account under section 815(c)(3) for a taxable year beginning in 1959 or 1960 on account of a distribution in 1959 or 1960 (not including any distribution treated under section 815(d)(2)(B) as made in 1959 or 1960), the tax imposed for such taxable year on the life insurance company taxable income shall be the amount determined under paragraph (1) reduced by the following percentage of the amount by which the tax imposed by paragraph (1) is (without regard to this paragraph) increased, on account of the amount so subtracted, by reason of section 802(b)(3)—

(A) in the case of a taxable year beginning in 1959, 66⅔ percent; and

(B) in the case of a taxable year beginning in 1960, 33⅓ percent.

The preceding sentence shall not apply with respect to any payment treated as a distribution under section 815(d)(3).

(b) LIFE INSURANCE COMPANY TAXABLE INCOME DEFINED.—For purposes of this part, the term 'life insurance company taxable income' means the sum of—

(1) the taxable investment income (as defined in section 804) or, if smaller, the gain from operations (as defined in section 809),

(2) if the gain from operations exceeds the taxable investment income, an amount equal to 50 percent of such excess, plus

(3) the amount subtracted from the policyholders surplus account for the taxable year, as determined under section 815.

[Note: The foregoing I.R.C. Section 802 is as it appears in Pub. L. No. 86-89, §2(a), 73 Stat. 115; it has been amended subsequently in respects not material to this case and appears in the current Internal Revenue Code.]

Sec. 809. In General.

(a) EXCLUSION OF SHARE OF INVESTMENT YIELD SET ASIDE FOR POLICYHOLDERS.—

(1) AMOUNT.—The share of each and every item of investment yield (including tax-exempt interest, partially tax-exempt interest, and dividends received) of any life insurance company set aside for policyholders shall not be included in gain or loss from

operations. For purposes of the preceding sentence, the share of any item set aside for policyholders shall be that percentage obtained by dividing the required interest by the investment yield; except that if the required interest exceeds the investment yield, then the share of any item set aside for policyholders shall be 100 percent.

(2) REQUIRED INTEREST.—For purposes of this part, the required interest for any taxable year is the sum of the products obtained by multiplying—

(A) each rate of interest required, or assumed by the taxpayer, in calculating the reserves described in section 810(c), by

(B) the means of the amount of such reserves computed at that rate at the beginning and end of the taxable year.

(b) GAIN AND LOSS FROM OPERATIONS.—

(1) GAIN FROM OPERATIONS DEFINED.—For purposes of this part, the term 'gain from operations' means the amount by which the sum of the following exceeds the deductions provided by subsection (d):

(A) the life insurance company's share of each and every item of investment yield (including tax-exempt interest, partially tax-exempt interest, and dividends received); and

(B) the sum of the items referred to in subsection (c).

(2) LOSS FROM OPERATIONS DEFINED.—For purposes of this part, the term 'loss from operations' means the amount by which the sum of the deductions provided by subsection (d) exceeds the sum of—

(A) the life insurance company's share of each and every item of investment yield (including tax-exempt interest, partially tax-exempt interest, and dividends received); and

(B) the sum of the items referred to in subsection (c).

(3) LIFE INSURANCE COMPANY'S SHARE.—For purposes of this subpart, the life insurance company's share of any item shall be that percentage which, when added to the percentage obtained under the second sentence of subsection (a)(1), equals 100 percent.

(4) EXCEPTION.—If it is established in any case that the application of the definition of gain from operations contained in paragraph (1) results in the imposition of tax on—

(A) any interest which under section 103 is excluded from gross income,

(B) any amount of interest which under section 242 (as modified by section 804(a)(3)) is allowable as a deduction, or

(C) any amount of dividends received which under sections 243, 244, and 245 (as modified by subsection (d)(8)(B)) is allowable as a deduction,

adjustment shall be made to the extent necessary to prevent such imposition.

(c) GROSS AMOUNT.—For purposes of subsections (b)(1) and (2), the following items shall be taken into account:

(1) PREMIUMS.—The gross amount of premiums and other consideration (including advance premiums, deposits, fees, assessments, and consideration in respect

of assuming liabilities under contracts not issued by the taxpayer) on insurance and annuity contracts (including contracts supplementary thereto); less return premiums, and premiums and other consideration arising out of reinsurance ceded. Except in the case of amounts of premiums or other consideration returned to another life insurance company in respect of reinsurance ceded, amounts returned where the amount is not fixed in the contract but depends on the experience of the company or the discretion of the management shall not be included in return premiums.

(2) DECREASES IN CERTAIN RESERVES.—Each net decrease in reserves which is required by section 810 or 811(b)(2) to be taken into account for purposes of this paragraph.

(3) OTHER AMOUNTS.—All amounts, not included in computing investment yield and not includible under paragraph (1) or (2), which under this subtitle are includible in gross income.

Except as included in computing investment yield, there shall be excluded any gain from the sale or exchange of a capital asset, and any gain considered as gain from the sale or exchange of a capital asset.

(d) DEDUCTIONS.—For purposes of subsections (b)(1) and (2), there shall be allowed the following deductions:

(1) DEATH BENEFITS, ETC.—All claims and benefits accrued, and all losses incurred (whether or not ascertained), during the taxable year on insurance and annuity contracts (including contracts supplementary thereto).

(2) INCREASES IN CERTAIN RESERVES.—The net increase in reserves which is required by section 810 to be taken into account for purposes of this paragraph.

(3) DIVIDENDS TO POLICYHOLDERS.—The deduction for dividends to policyholders (determined under section 811(b)).

(4) OPERATIONS LOSS DEDUCTION.—The operations loss deduction (determined under section 812).

(5) CERTAIN NONPARTICIPATING CONTRACTS.—An amount equal to 10 percent of the increase for the taxable year in the reserves for nonparticipating contracts or (if greater) an amount equal to 3 percent of the premiums for the taxable year (excluding that portion of the premiums which is allocable to annuity features) attributable to nonparticipating contracts (other than group contracts) which are issued or renewed for periods of 5 years or more. For purposes of this paragraph, the term 'reserves for nonparticipating contracts' means such part of the life insurance reserves (excluding that portion of the reserves which is allocable to annuity features) as relates to nonparticipating contracts (other than group contracts). For purposes of this paragraph and paragraph (6), the term 'premiums' means the net amount of the premiums and other consideration taken into account under subsection (c)(1).

(6) GROUP LIFE, ACCIDENT, AND HEALTH INSURANCE.—An amount equal to 2 percent of the premiums for the taxable year attributable to group life insurance contracts and group accident and health insurance contracts. The deduction under this paragraph for the taxable year and all preceding taxable years shall not exceed an amount equal to 50 percent of the premiums for the taxable year attributable to such contracts.

(7) ASSUMPTION BY ANOTHER PERSON OF LIABILITIES UNDER INSURANCE, ETC., CONTRACTS.—The consideration (other than consideration arising out of reinsurance ceded) in respect of the assumption by another person of liabilities under insurance and annuity contracts (including contracts supplementary thereto).

(8) TAX-EXEMPT INTEREST, DIVIDENDS, ETC.—

(A) LIFE INSURANCE COMPANY'S SHARE.—Each of the following items:

(i) the life insurance company's share of interest which under section 103 is excluded from gross income,

(ii) the deduction for partially tax-exempt interest provided by section 242 (as modified by section 804(a)(3)) computed with respect to the life insurance company's share of such interest, and

(iii) the deductions for dividends received provided by sections 243, 244, and 245 (as modified by subparagraph (B)) computed with respect to the life insurance company's share of the dividends received.

(B) APPLICATION OF SECTION 246(b).—In applying section 246(b) (relating to limitation on aggregate amount of deductions for dividends received) for purposes of subparagraph (A)(iii), the limit on the aggregate amount of the deductions allowed by sections 243(a), 244, and 245 shall be 85 percent of the gain from operations computed without regard to—

(i) the deductions provided by paragraphs (3), (5), and (6) of this subsection,

(ii) the operations loss deduction provided by section 812, and

(iii) the deductions allowed by sections 243(a), 244, and 245,

but such limit shall not apply for any taxable year for which there is a loss from operations.

(9) INVESTMENT EXPENSES, ETC.—Investment expenses to the extent not allowed as a deduction under section 804(c)(1) in computing investment yield, and the amount (if any) by which the sum of the deductions allowable under section 804(c) exceeds the gross investment income.

(10) SMALL BUSINESS DEDUCTION.—A small business deduction in an amount equal to the amount determined under section 804(a)(4).

(11) CERTAIN MUTUALIZATION DISTRIBUTIONS.—The amount of distributions to shareholders made in 1958 and 1959 in acquisition of stock pursuant to a plan of mutualization adopted before January 1, 1958.

(12) OTHER DEDUCTIONS.—Subject to the modifications provided by subsection (e), all other deductions allowed under this subtitle for purposes of computing taxable income to the extent not allowed as deductions in computing investment yield.

Except as provided in paragraph (3), no amount shall be allowed as a deduction under this subsection in respect of dividends to policyholders.

(e) MODIFICATIONS.—The modifications referred to in subsection (d)(12) are as follows:

(1) INTEREST.—In applying section 163 (relating to deduction for interest), no deduction shall be allowed for interest in respect of items described in section 810(c).

(2) BAD DEBTS.—Section 166(c) (relating to reserve for bad debts) shall not apply.

(3) CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.—In applying section 170—

(A) the limit on the total deductions under such section provided by the first sentence of section 170(b)(2) shall be 5 percent of the gain from operations computed without regard to—

(i) the deduction provided by section 170,

(ii) the deductions provided by paragraphs (3), (5), (6), and (8) of subsection (d), and

(iii) any operations loss carryback to the taxable year under section 812; and

(B) under regulations prescribed by the Secretary or his delegate, a rule similar to the rule contained in section 170(b)(3) shall be applied.

(4) AMORTIZABLE BOND PREMIUM.—Section 171 shall not apply.

(5) NET OPERATING LOSS DEDUCTION.— The deduction for net operating losses provided in section 172 shall not be allowed.

(6) PARTIALLY TAX-EXEMPT INTEREST.—The deduction for partially tax-exempt interest provided by section 242 shall not be allowed.

(7) DIVIDENDS RECEIVED.—The deductions for dividends received provided by sections 243, 244, and 245 shall not be allowed.

(f) LIMITATION ON CERTAIN DEDUCTIONS.—

(1) IN GENERAL.—The amount of the deductions under paragraphs (3), (5), and (6) of subsection (d)

shall not exceed $250,000 plus the amount (if any) by which—

(A) the gain from operations for the taxable year, computed without regard to such deductions, exceeds

(B) the taxable investment income for the taxable year.

(2) APPLICATION OF LIMITATION.—The limitation provided by paragraph (1) shall apply first to the amount of the deduction under subsection (d)(6), then to the amount of the deduction under subsection (d)(5), and finally to the amount of the deduction under subsection (d)(3).

(g) LIMITATIONS ON DEDUCTION FOR CERTAIN MUTUALIZATION DISTRIBUTIONS.—

(1) DEDUCTION NOT TO REDUCE TAXABLE INVESTMENT INCOME.—The amount of the deduction under subsection (d)(11) shall not exceed the amount (if any) by which—

(A) the gain from operations for the taxable year, computed without regard to such deduction (but after the application of subsection (f)), exceeds

(B) the taxable investment income for the taxable year.

(2) DEDUCTION NOT TO REDUCE TAX BELOW 1957 LAW.—The deduction under subsection (d)(11) for the taxable year shall be allowed only to the extent that such deduction (after the application of all other deductions provided by subsection (d)) does not reduce the amount of the tax imposed by section 802(a)(1) for such taxable year below the amount of tax

which would have been imposed by section 802(a) as in effect for 1957, if this part, as in effect for 1957, applied for such taxable year.

(3) APPLICATION OF SECTION 815.—That portion of any distribution with respect to which a deduction is allowed under subsection (d)(11) shall not be treated as a distribution to shareholders for purposes of section 815; except that in the case of any distribution made in 1959, such portion shall be treated as a distribution with respect to which a reduction is required under section 815(e)(2)(B).

[Note: The foregoing I.R.C. Section 809 is as it appears in Pub. L. No. 86-89, Section 2(a), 73 Stat. 121; it has been amended subsequently in respects not material to this case and appears in the Current Internal Revenue Code.]

Sec. 811. Dividends to Policyholders.

(a) DIVIDENDS TO POLICYHOLDERS DEFINED.—For purposes of this part, the term 'dividends to policyholders' means dividends and similar distributions to policyholders in their capacity as such. Such term does not include interest paid (as defined in section 805(e)).

(b) AMOUNT OF DEDUCTION.—

(1) IN GENERAL.—Except as limited by section 809(f), the deduction for dividends to policyholders for any taxable year shall be an amount equal to the dividends to policyholders paid during the taxable year—

(A) increased by the excess of (i) the amounts held at the end of the taxable year as reserves for dividends to policyholders (as defined in subsection (a)) payable during the year following the taxable year, over (ii) such amounts held at the end of the preceding taxable year, or

(B) decreased by the excess of (i) such amounts held at the end of the preceding taxable year, over (ii) such amounts held at the end of the taxable year.

For purposes of subparagraphs (A) and (B), there shall be included as amounts held at the end of any taxable year amounts set aside, before the 16th day of the third month of the year following such taxable year (or, in the case of a mutual savings bank subject to the tax imposed by section 594, before the 16th day of the fourth month of the year following such taxable year), for payment during the year following such taxable year.

(2) CERTAIN AMOUNTS TO BE TREATED AS NET DECREASES.—If the amount determined under paragraph (1)(B) exceeds the dividends to policyholders paid during the taxable year, the amount of such excess shall be a net decrease referred to in section 809(c)(2).

[Note: The foregoing I.R.C. Section 811 is as it appears in Pub. L. No. 86-69, §2(a), 73 Stat. 126; it has been amended subsequently in respects not material to this case and appears in the current Internal Revenue Code.]

Sec. 818. Accounting Provisions.

(a) METHOD OF ACCOUNTING.—All computations entering into the determination of the taxes imposed by this part shall be made—

(1) under an accrual method of accounting, or

(2) to the extent permitted under regulations prescribed by the Secretary or his delegate, under a combination of an accrual method of accounting with any other method permitted by this chapter (other than the cash receipts and disbursements method).

Except as provided in the proceeding sentence, all such computations shall be made in a manner consistent with the manner required for purposes of the annual statement approved by the National Association of Insurance Commissioners.

(b) AMORTIZATION OF PREMIUM AND ACCRUAL OF DISCOUNT.—

(1) IN GENERAL.—The appropriate items of income, deductions, and adjustments under this part shall be adjusted to reflect the appropriate amortization of premium and the appropriate accrual of discount attributable to the taxable year on bonds, notes, debentures, or other evidences of indebtedness held by a life insurance company. Such amortization and accrual shall be determined—

(A) in accordance with the method regularly employed by such company, if such method is reasonable, and

(B) in all other cases, in accordance with regulations prescribed by the Secretary or his delegate.

(2) SPECIAL RULES.—

(A) AMORTIZATION OF BOND PREMIUM.—In the case of any bond (as defined in section 171(d)) acquired after December 31, 1957, the amount of bond premium, and the amortizable bond premium for the taxable year, shall be determined under section 171(b) as if the election set forth in section 171(c) had been made.

(B) CONVERTIBLE EVIDENCES OF INDEBTEDNESS.—In no case shall the amount of premium on a convertible evidence of indebtedness include any amount attributable to the conversion features of the evidence of indebtedness.

(c) LIFE INSURANCE RESERVES COMPUTED ON PRELIMINARY TERM BASIS.—For purposes of this part (other than section 801), at the election of the taxpayer the amount taken into account as life insurance reserves with respect to contracts for which such reserves are computed on a preliminary term basis may be determined on either of the following bases:

(1) EXACT REVALUATION.—As if the reserves for all such contracts had been computed on a net level premium basis (using the same mortality assumptions and interest rates for both the preliminary term basis and the net level premium basis).

(2) APPROXIMATE REVALUATION.—The amount computed without regard to this subsection—

(A) increased by $21 per $1,000 of insurance in force (other than term insurance) under such contracts, less 2.1 percent of reserves under such contracts, and

(B) increased by $5 per $1,000 of term insurance in force under such contracts which at the time of issuance cover a period of more than 15 years, less 0.5 percent of reserves under such contracts.

If the taxpayer makes an election under either paragraph (1) or (2) for any taxable year, the basis adopted shall be adhered to in making the computations under this part (other than section 801) for the taxable year and all subsequent taxable years unless a change in the basis of computing such reserves is approved by the Secretary or his delegate, except that if, pursuant to an election made for a taxable year beginning in 1958, the basis adopted is the basis provided in paragraph (2), the taxpayer may adopt the basis provided by paragraph (1) for its first taxable year beginning after 1958.

(d) SHORT TAXABLE YEARS.—If any return of a corporation made under this part is for a period of less than the entire calendar year (referred to in this subsection as 'short period'), then section 443 shall not apply in respect of such period, but—

(1) the taxable investment income and the gain or loss from operations shall be determined, under regulations prescribed by the Secretary or his delegate, on an annual basis by a ratable daily projection of the appropriate figures for the short period,

(2) that portion of the life insurance company taxable income described in paragraphs (1) and (2) of section 802(b) shall be determined on an annual basis by treating the amounts ascertained under paragraph (1) as the taxable investment income and the gain or loss from operations for the taxable year, and

(3) that portion of the life insurance company taxable income described in paragraphs (1) and (2) of section 802(b) for the short period shall be the amount which bears the same ratio to the amount ascertained under paragraph (2) as the number of days in the short period bears to the number of days in the entire calendar year.

(e) TRANSITIONAL RULE FOR CHANGES IN METHOD OF ACCOUNTING.—

(1) IN GENERAL.—If the method of accounting required to be used in computing the taxpayer's taxes under this part for the taxable year 1958 is different from the method used in computing its taxes under this part for 1957, then there shall be ascertained the net amount of those adjustments which are determined (as of the close of 1957) to be necessary solely by reason of the change to the method required by subsection (a) in order to prevent amounts from being duplicated or omitted. The amount of the taxpayer's

tax for 1957 shall be recomputed (under the law applicable to 1957, modified as provided in paragraph (4)) taking into account an amount equal to 1/10 of the net amount of the adjustments determined under the preceding sentence. The amount of increase or decrease (as the case may be) referred to in paragraph (2) or (3) shall be the amount of the increase or decrease ascertained under the preceding sentence, multiplied by 10.

(2) TREATMENT OF DECREASE.—For purposes of subtitle F, if the recomputation under paragraph (1) results in a decrease, the amount thereof shall be a decrease in the tax imposed for 1957; except that for purposes of computing the period of limitation on the making of refunds or the allowance of credits with respect to such overpayment, the amount of such decrease shall be treated as an overpayment of tax for 1959. No interest shall be paid, for any period before March 16, 1960, on any overpayment of the tax imposed for 1957 which is attributable to such decrease.

(3) TREATMENT OF INCREASE.—

(A) IN GENERAL.—For purposes of subtitle F (other than sections 6016 and 6655), if the recomputation under paragraph (1) results in an increase, the amount thereof shall be treated as a tax imposed by this subsection for 1959. Such tax shall be payable in 10 equal annual installments, beginning with March 15, 1960.

(B) SPECIAL RULES.—For purposes of subparagraph (A)—

(i) No interest shall be paid on any installment described in subparagraph (A) for any period before the time prescribed in such subparagraph for the payment of such installment.

(ii) Section 6152(c) (relating to proration of deficiencies to installments) shall apply.

(iii) In applying section 6502(a)(1) (relating to collection after assessment), the assessment of any installment described in subparagraph (A) shall be treated as made at the time prescribed by such subparagraph for the payment of such installment.

(iv) Except as provided in section 381(c)(22), if for any taxable year the taxpayer is not a life insurance company, the time for payment of any remaining installments described in subparagraph (A) shall be the date (determined without regard to any extension of time) for filing the return for such taxable year.

(4) MODIFICATION OF 1957 TAX COMPUTATION.—In recomputing the taxpayer's tax for 1957 for purposes of paragraph (1)—

(A) section 804(b) (as in effect for 1957) shall not apply with respect to any amount required to be taken into account by such paragraph, and

(B) the amount of the deduction allowed by section 805 (as in effect for 1957) shall not be reduced by reason of any amount required to be taken into account by such paragraph.

(f) DENIAL OF DOUBLE DEDUCTIONS.—Nothing in this part shall permit the same item to be deducted more than once under subpart B and once under subpart C.

[Note: The foregoing I.R.C. Section 818 is as it appears in Pub. L. No. 86-69, §2(a), 73 Stat. 133; it has been amended subsequently in respects not material to this case and appears in the current Internal Revenue Code.]

Supreme Court, U. S.
FILED
APR 15 1980
ROBERT ROOAK, JR., CLERK

No. 79-1305

In the Supreme Court of the United States

OCTOBER TERM, 1979

LUTHERAN MUTUAL LIFE INSURANCE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

GARY R. ALLEN
DAVID ENGLISH CARMACK
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. A1-A8) is reported at 602 F. 2d 328.

JURISDICTION

The judgment of the Court of Claims was entered on July 18, 1979. The Court of Claims denied a petition for rehearing on September 28, 1979 (Pet. App. A9). By order dated December 21, 1979, the Chief Justice extended the time in which a petition for a writ of certiorari could be filed to and including February 25, 1980. The petition was filed on February 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in computing petitioner's deduction for dividends to policyholders allowed mutual life insurance companies by Section 809(d)(3) of the Internal Revenue Code of 1954, the amount of petitioner's opening reserve for dividends to policyholders for 1958 should be determined, as the Court of Claims held, by reference to the ending amount of these reserves for 1957, as reflected on its annual statement for that preceding year, or, as petitioner contends, by reference to the dividends that petitioner actually paid to policyholders in 1958.

STATUTES AND REGULATIONS

The relevant portions of Sections 809, 811, and 818 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in Pet. App. C A11-A22.

STATEMENT

Petitioner is a mutual life insurance company organized under Iowa law. In computing its taxable income for the year 1958, the first year such companies were subject to income tax under the Life Insurance Company Income Tax Act of 1959, Pub. L. No. 86-69, 73 Stat. 112, petitioner was entitled, under Section 809(d)(3) of the Internal Revenue Code of 1954, to a deduction for dividends to policyholders as determined under Code Section 811(b). Section 811(b) provides, in pertinent part, that the deduction for dividends to policyholders is computed by adding to (or subtracting from) the amount of dividends actually paid to policyholders during the taxable year the difference between (1) the amount held at the end of such year as reserves for dividends to policyholders payable in the following year and (2) the amount held as reserves for dividends to policyholders at

the end of the preceding taxable year. These reserves are only estimates based on anticipated dividends payable in the following year. Any overestimate or underestimate of the beginning reserve may result in a larger or smaller deduction for dividends to policyholders for the taxable year to the extent that such overstatement or understatement is not matched by a corresponding overstatement or understatement in the ending reserve.

As required by state law, petitioner filed annual statements for 1957 and 1958 with the insurance commissioners of the states in which it did business on the form prescribed by the National Association of Insurance Commissioners (NAIC). Its 1957 annual statement showed $55,000 as dividends due to policyholders and unpaid for that year and $2,000,000 as the estimated amount of dividends payable to policyholders in the following year (1958) (Pet. App. A3). However, in computing the amount of its deduction for dividends to policyholders for 1958 under Section 811(b), petitioner did not use, as its opening reserve for dividends to policyholders, the amounts reported on its annual statement for 1957 as unpaid dividends for 1957 and estimated dividends payable in 1958. Instead, it included in its opening dividend reserve the $55,000 amount of unpaid dividends reported as of the end of 1957, plus the $1,928,455 of dividends that it actually paid in 1958 (Pet. App. A3-A4).

On audit, the Commissioner determined that petitioner's opening dividend reserve for 1958 should have included both the $55,000 of unpaid dividends and the $2,000,000 of estimated dividends for 1958 as reported on its 1957 annual statement (Pet. App. A4). Petitioner paid the deficiency resulting from this and other adjustments,

filed a claim for refund, and, after its disallowance, filed this refund suit in the Court of Claims. The Court of Claims upheld the Commissioner's position. In its view, the language of Section 811(b) and its legislative history compelled the conclusion that in computing its 1958 deduction for dividends to policyholders, petitioner was required to include the estimated amount of reserves for dividends to policyholders as reported in its 1957 annual statement in its opening reserves (Pet. App. A1-A8).

ARGUMENT

1. The decision below correctly held that in computing its deduction for dividends to policyholders, the amount of petitioner's opening reserve for such dividends for 1958 should be determined by reference to the ending amount of these reserves for 1957.

Petitioner argues (Pet. 8-10) that in computing its deduction for dividends to policyholders for the first taxable year in which it was subject to tax under the Life Insurance Company Income Tax Act of 1959, the amount of its reserves for such dividends as of the end of the preceding year, as reflected on its annual statement for that year, should be disregarded, and that the amounts of dividends actually paid to policyholders during 1958 should be taken as its beginning reserves for such dividends. As petitioner views the matter, while the effect of succeeding overestimates or underestimates of reserves for dividends to policyholders will theoretically be "corrected" in some later year, the effect of an overestimate of the beginning reserves for the initial year of taxability will never be subject to any corrective offset

(Pet. 9).[1] Petitioner therefore proposes to correct its own overestimate of such reserves as reflected on its annual statement by reducing its beginning reserves to the amount actually paid out in 1958.

But the defect in petitioner's argument is that the statute simply does not provide for such an adjustment in opening reserves. In computing the deduction for the dividend to policyholders, the statute clearly provides that the amount of the deduction consists of dividends actually paid, increased (or reduced) by the difference between the amount held as reserves for these dividends at the end of the taxable year and the amount held as reserves for this purpose at the end of the preceding year. No provision was enacted with respect to adjusting the opening reserves for the first year. Rather, the opening reserves for the first year, as well as any other year, are those reflected on its annual statement as being held for this purpose at the end of the preceding year.[2]

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[1]Petitioner's argument necessarily rests on the premise that it will not continue to overestimate (or to underestimate) the amount of its reserves over the entire period it remains taxable under the statute. If this were the case, an overstatement in the beginning reserves for this purpose would never reduce the amount of the deduction allowable under Section 809(d)(3) as long as such an overstatement continues to be reflected in the company's ending reserves.

[2]In enacting the Life Insurance Company Tax Act of 1959, Congress referred to computations made by the life insurance companies in their required NAIC annual statement. Section 818(a) of the Code; *Commissioner* v. *Standard Life & Acc. Ins. Co.*, 433 U.S. 148, 157-159 (1977). The NAIC annual statement filed by petitioner reflects the amounts held by the company as reserves for dividends to policyholders. The amounts that the statute treats as a reserve for dividends are those amounts actually set aside for this purpose as of the end of the taxable year (with certain adjustments not here in issue). Treasury Regulations on Income Tax (1954 Code), Section 1.811-2(c)(1) (26 C.F.R.).

Petitioner, however, argues (Pet. 9-13) that Congress intended that any overestimate of opening reserves for dividends to policyholders for 1958 should be rectified by allowing such reserves to be adjusted, retroactively, to reflect the amount of dividends actually paid out in the initial year of taxability under the 1959 Act. To be sure, an amendment was offered in the Senate to accomplish this objective (Pet. App. A4-A5). But as the Court of Claims correctly observed (Pet. App. A5-A7), the Senate did not accept that amendment and the House of Representatives never considered it. Thus, not only did Congress not intend the result urged by petitioner; the Senate specifically rejected an attempt to amend the statute to allow such a result.

In holding that petitioner could not resuscitate the statutory amendment offered in 1959 and rejected by Congress, the decision of the Court of Claims is in accord with *Pacific Mutual Life Insurance Co.* v. *Commissioner*, 48 T.C. 118, 127-129 (1967), rev'd on other issues, 413 F. 2d 55 (9th Cir. 1969). There, the Tax Court rejected a similar contention that Congress intended to allow life insurance companies to employ "actuarial hindsight" and recompute their beginning insurance reserves for 1958 to reflect their actual claims experience on the policies in question.[3]

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[3]As in the instant case, the taxpayer in *Pacific Mutual* argued that an overstatement of opening insurance reserves for the first year in which such companies became taxable on underwriting income would result in a distortion of income that would not ultimately be corrected in a later year, and had cited the same legislative history.

Contrary to petitioner's argument (Pet. 8), the decision below and *Pacific Mutual* do not conflict with *Home Mutual Insurance Co.* v. *Commissioner*, 70 T.C. 944 (1978), appeal pending, Nos. 79-1602 and 79-1603 (7th Cir.). In *Home Mutual*, the Tax Court concluded that in computing its "losses incurred" deduction for 1963 under Section 832(b)(5) of the Code, a mutual casualty insurance company (which became taxable on its underwriting income for years beginning after December 31, 1962, under the Revenue Act of 1962, Pub. L. No. 87-834, Section 8, 76 Stat. 960) could adjust its estimated "unpaid losses" as of December 31, 1962, to reflect the lesser amounts it ultimately paid in settlement of those claims. To be sure, by permitting an adjustment based upon the actual experience of a mutual casualty insurance company to reflect the first year of the operation of the statute, the Tax Court's ruling in *Home Mutual* rests upon the "actuarial hindsight" rationale rejected by *Pacific Mutual* and the decision below. But *Home Mutual* involved an entirely different provision of the Code Section 832(b)(5)—and therefore does not conflict with the decision below. Indeed, the provision involved in *Home Mutual* deals exclusively with the computation of the taxable income of insurance companies other than life insurance companies. On the other hand, Section 811(b)—and the provisions at issue in *Pacific Mutual* are concerned solely with the taxation of life insurance companies.

2. Petitioner further argues (Pet. 10-13) that the Commissioner's refusal to allow its claimed adjustment is an abuse of discretion that should be corrected by this Court because a representative of the Secretary of the Treasury allegedly advised Congress by letter in 1958 that opening reserves could be adjusted to reflect actual payments. However, petitioner misstates the nature of the Treasury's 1958 letter to the Senate Finance Committee. The Treasury merely advised the Senate Finance

Committee that the reserve for dividends to policyholders at the end of 1957 could be corrected for "technical errors" such as those that might be caused, for example, "by the introduction of new data-processing equipment" (Pet. App. A5 n.6; 105 Cong. Rec. 8435 (1959)). This was simply a restatement of the traditional rule that reserves may be retroactively adjusted to correct mathematical errors, but may not be retroactively adjusted with the benefit of hindsight to correct errors of judgment in the original estimate. *Pacific Mutual Life Insurance Co.* v. *Commissioner*, *supra*, 48 T.C. at 129. But petitioner's overstatement of its reserve for dividends to policyholders in its 1957 NAIC annual statement was not due to a technical error of the sort referred to by the Treasury statement. Rather, it was the same kind of judgmental error that was involved in *Pacific Mutual*. Thus, the Commissioner's refusal to permit petitioner to adjust its opening reserves for 1958 is entirely consistent with the Treasury's 1959 letter to the Senate Finance Committee.[4]

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[4]Moreover, the Treasury's views were not communicated to the House of Representatives, which had approved the statutory provisions in question before they were referred to the Senate. Thus, as the Court of Claims below pointed out (Pet. App. A7), the House of Representatives could hardly have relied on the alleged promises by the Treasury Department to correct the opening reserves for dividends to policyholders for life insurance companies. In these circumstances, the Court of Claims properly concluded (*ibid.*), "we cannot find a *Congressional* intent to allow special treatment of the opening dividend reserve, especially in the face of an unambiguous statute which makes no mention of such treatment * * *" (emphasis in original).

3. Contrary to petitioner's final argument (Pet. 13-15), the question presented has no administrative importance. There has been little, if any, litigation involving the proper interpretation of the provisions of Section 811(b) here in question. Moreover, the decision affects only the computation of the dividends to policyholders deduction allowable to mutual life insurance companies for 1958. While a similar issue may be presented with respect to the computation of the "losses incurred" deduction allowable to mutual casualty companies for 1963 (see page 7, *supra*), the question is otherwise non-recurring and has no continuing importance as to the provisions involving the taxation of either life insurance or non-life insurance companies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

GARY R. ALLEN
DAVID ENGLISH CARMACK
Attorneys

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